

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. PAUL

In the Matter of Adverse Action Against All
Licenses Held By Moonlight Magic, Inc.,
d/b/a Moonlight

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge M. Kevin Snell (the ALJ) on May 12, 2010, at the Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The OAH record closed on May 12, 2010, at the close of the hearing.

Virginia D. Palmer, Assistant St. Paul City Attorney, 15 West Kellogg Boulevard, Suite 400, St. Paul, Minnesota 55102, appeared for the City of St. Paul (the City). Richard Sand, Esq., Richard Sand & Associates, P.A., 168 Nina Street, Suite 1700, Minneapolis, Minnesota 55102, appeared for Moonlight Magic, Inc. (Moonlight) at the hearing.

STATEMENT OF THE ISSUES

1. Did the City prove by a preponderance of the evidence that Moonlight served alcohol to underage persons on December 17, 2009?

Yes, the ALJ finds that the City did meet its burden of proof on this issue.

2. Did the City prove by a preponderance of the evidence that, on December 31, 2009, Moonlight violated the conditions of its license by failing to check the identification of all patrons entering the establishment?

Yes, the ALJ finds that the City did meet its burden of proof on this issue.

3. If so, is revocation the appropriate licensing sanction based on the Licensee's history of violations?

For the reasons set for the below, the Administrative Law Judge concludes that a licensing sanction other than revocation is warranted on this record.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Factual Background

1. Mr. Moua Yang is the owner of Moonlight Magic, Inc. d/b/a Moonlight, and the property, which is located at 601 Western Avenue North in the City of St. Paul. Moonlight is a restaurant and bar that holds restaurant, entertainment, cigarette/tobacco, and liquor licenses issued by the City.¹

2. On October 12, 2005, Moonlight first received its liquor license.² Moonlight's current liquor and other licenses contain fourteen conditions. Condition number four states:

Security at the entrance (or bar staff if no security is present) shall verify the age of all patrons entering the establishment by checking state or federally issued identification cards (no picture I.D., no entrance). Patrons re-entering the establishment shall be subject to the same security measures as patrons entering the establishment for the first time.³

3. The Licensee operates separate venues, with two separate entrances, under these licenses. The lower level, known as Moonlight, contains a bar and restaurant. Moonlight caters to an Asian clientele.⁴ The upper level is a well-known blues club started in 1979 known as Wilebski's Blues Saloon ("Wilebski's").⁵ Wilebski's caters to a black and white clientele.⁶

4. The son of Thaddeus Wilebski, II, operates the Wilebski's venue under an agreement with Moonlight. Mr. Thaddeus Wilebski II acts as a consultant to his son and occasionally works at the venue. He is also a prior owner of the property.⁷

5. Mr. Wilebski's nephews provide security for the Wilebski's venue. The Wilebskis and the nephews have been orally advised of the license conditions but have not received or viewed the 14 conditions as written.⁸

6. Patrons enter to the Wilebski's venue through a stairwell that has a landing approximately halfway to the top. Security personnel check patrons' identification at the midway landing. At the top of the stairs is another landing where

¹ Testimony of Moua Yang and Christine Rozek, Deputy Director, St. Paul Department of Safety and Inspections (DSI); Exhibit 2-1.

² Ex. 1-2; Test of C. Rozek.

³ Ex. 2-1.

⁴ Test. of Moua Yang.

⁵ Testimony of Thaddeus Wilebski II, and Sergeant David Schoen, St. Paul Police Department.

⁶ Test of M. Yang.

⁷ *Id.*; Test. of T. Wilebski.

⁸ *Id.*

employees collect cover-charge monies from patrons. After payment of the cover charge, patrons are permitted to enter the bar and entertainment area.⁹

Serving Alcohol to Underage Persons on December 17, 2009

7. Sergeant David Schoen has been a police officer for more than 22 years and has been attached to the City Police Department Vice Unit for the past 10 years. For approximately the past five years, Sergeant Schoen has been the principal liaison to the Department of Safety and Inspections (DSI), where he maintains an office.¹⁰

8. As he routinely does, on December 17, 2009, Sergeant Schoen was conducting a series of undercover checks of bars for liquor, tobacco, and license condition compliance.¹¹

9. The compliance checks on December 17, 2009, included the use of three minors to check whether licensees would serve them alcoholic beverages or sell them tobacco. One 17-year-old minor would attempt to purchase cigarettes. The other two “checkers,” one 18 and one 19, would go in together and attempt to purchase and be served alcohol. Payment for attempted purchases of alcohol would be made with a marked twenty-dollar bill.¹²

10. Moonlight passed the tobacco check because the tobacco checker reported that Moonlight does not sell cigarettes.¹³

11. Both of the alcohol checkers are sons of police officers and have prior experience in conducting compliance checks. One of them is the son of Sergeant Schoen. Sergeant Schoen personally trained both checkers. Among the rules that the checkers learn and follow are that they: must go directly to the bar and order alcohol; must be truthful if asked for their identification; must be polite and courteous; may not engage in deceit; and must call Sergeant Schoen immediately if served alcohol.¹⁴

12. The two minor alcohol checkers entered Moonlight at approximately 7:50 p.m. and ordered two Bud Light beers from the sole bartender, Nu Chi Lee. Within a minute and a half of their entrance into the bar, Ms. Lee had served each of the checkers a bottle of Bud Light beer, accepted the marked twenty-dollar bill and placed the change on the bar. Ms. Lee, who had been bartending for two months, did not ask either checker for their identification prior to their purchase. Upon being sold the beers, Sergeant Schoen’s son called him, and advised him that they had been served alcohol.¹⁵

⁹ Test. of T. Wilebski and D. Schoen.

¹⁰ Test. of D. Schoen.

¹¹ *Id.*

¹² *Id.* Ex. 3.

¹³ Testimony of Sergeant John Bandemer.

¹⁴ Test. of D. Schoen.

¹⁵ *Id.*; Ex. 3.

13. Sergeant Schoen and Sergeant John Bandemer then entered Moonlight and identified themselves to Ms. Lee and asked her if she had served the checkers the two Bud Light beers that were sitting on the bar in front of them. Ms. Lee declined to answer and asked to get her manager. Sergeants Schoen and Bandemer photographed Ms. Lee and the two beers. Ms. Lee provided her Minnesota driver's license to confirm her identity. Sergeant Schoen then asked Ms. Lee for the marked twenty-dollar bill, which she retrieved from the cash register and returned to him.¹⁶

14. Sergeant Schoen completed a report of the December 17, 2009, compliance check at Moonlight the next day, December 18, 2009. Sergeant Schoen's report was forwarded to DSI.¹⁷

Failure to Check Identification of Patrons on December 31, 2009

15. On December 31, 2009, two of Mr. Wilebski's nephews were wearing Wilebski Blues Saloon Security shirts and performing the security functions on the midway landing leading up to the Wilebski's venue. Mr. Wilebski and his girlfriend were at the upper landing collecting the \$20.00 cover charge.¹⁸

16. Undercover Sergeants Schoen and Sandell parked their unmarked vehicle¹⁹ near Moonlight at approximately 10:45 p.m. They observed several patrons outside smoking in front of the door leading upstairs to the Wilebski's venue. They observed many patrons coming and going from that door. It was busy with many cars on the street as well as the patrons coming and going.²⁰ One of the smoking patrons recognized one or both of the sergeants as police officers and went up the stairs and advised the two security personnel that the police were coming into the establishment.²¹

17. Sergeants Schoen and Sandell went up the stairs to the landing where one of the security personnel was checking identification. Sergeant Schoen observed that:

It appeared he was doing a good job of checking people under the age of 30. Sgt. Sandell and I were able to go by unchecked.²²

18. Sergeants Schoen and Sandell continued up the stairs to the upper landing where they were greeted by Mr. Wilebski and his girlfriend, who asked them for the \$20.00 cover charge.²³ Mr. Wilebski's girlfriend recognized Sergeant Sandell from a previous encounter. Both Mr. Wilebski and his girlfriend were very friendly. After Sergeants Schoen and Sandell declined to pay the \$20.00 cover charge since they said

¹⁶ *Id.*; Test. of J. Bandemer.

¹⁷ Ex. 3; Test. of C. Rozek and D. Schoen.

¹⁸ Test. of T. Wilebski and D. Schoen; Ex. 6-2.

¹⁹ Sgt. Schoen testified that the unmarked vehicle was either a red pick-up truck or a black Chevrolet Monte Carlo.

²⁰ Ex. 6-2; Test. of D. Schoen.

²¹ Test. of T. Wilebski.

²² Ex. 6-2; Test. of D. Schoen.

²³ *Id.*; Test. of T. Wilebski.

they were there for “just one,” Mr. Wilebski’s girlfriend told them to please come back another time.²⁴ It was very busy inside the bar with approximately 150 mostly white patrons, averaging 40 years of age, drinking and talking. Patrons were lined up at the bar waiting to be served. The band was preparing to play at the rear corner stage of the bar.²⁵

Procedural Findings

19. On July 15, 2009, the City Council imposed a \$2,000.00 fine and suspended the licenses of Moonlight for 30 days beginning August 5, 2009 through September 3, 2009, for violations of license conditions on four dates. Violations were insufficient security personnel, failure to maintain security videos, failure to wand and check identification, and failure to clear out patrons by the required time.²⁶

20. On August 5, 2009, the City Council suspended the licenses of Moonlight for 30 days beginning September 4, 2009 through October 3, 2009, for violations of license conditions on July 5, 2009. Violations were insufficient security personnel, failure to wand, and service of liquor after the time permitted.²⁷

21. On December 23, 2009, DSI sent a request for adverse action to the City Attorney’s Office related to the December 17, 2009, incident.²⁸

22. On January 6, 2010, the City sent a Notice of Intent to Revoke Licenses to Moonlight, because of the December 17, 2009, incident, incorrectly stating in the Notice that it was notice of a fourth appearance before the City Council.²⁹

23. On January 8, 2010, the City sent an Amended Notice of Intent to Revoke Licenses to Moonlight, because of the December 17, 2009, and December 31, 2009, incidents, stating in the notice that these were the third and fourth violations.³⁰

24. On January 15, 2010, Moonlight, through its attorney, requested a hearing in connection with the alleged violations.³¹

25. On April 12, 2010, the City issued a Notice of Administrative Hearing to Moonlight to be held on May 12, 2010.³²

Based on these Findings of Fact, the Administrative Law Judge makes the following:

²⁴ Test. of D. Schoen.

²⁵ Ex. 6-3.

²⁶ Ex. 1.

²⁷ Ex. 1-1.

²⁸ *Id.*

²⁹ Ex. 5.

³⁰ Ex. 7.

³¹ Ex. 8.

³² Ex. 9.

CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable procedures set forth in section 310.05 of the St. Paul Legislative Code.

3. The City gave proper notice of the hearing in this matter and has fulfilled all procedural requirements of rule or law.

4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by Moonlight Magic, Inc.

5. The St. Paul Legislative Code prohibits any licensee, or agent or employee thereof, from serving or dispensing any intoxicating liquor to any minor; “nor shall such licensee, agent or employee permit any minor to be furnished with or to consume any such liquor on the licensed premises; nor shall such licensee, agent or employee permit any minor to be delivered any such liquor.”³³ Licensees are responsible for insuring that any individual under the age of 21, other than an employee, who enters the establishment is present only for the purpose of consuming a meal or attending a social function open to the public held in a portion of the establishment where liquor is not sold, consumed, served or displayed.³⁴

6. The City demonstrated by a preponderance of the evidence that on December 17, 2009, the Licensee furnished and/or delivered liquor to minors on the premises in violation of § 409.08(2)(a) of the St. Paul Legislative Code.

7. The City demonstrated by a preponderance of the evidence that on December 31, 2009, Licensee failed to comply with Condition #4 of its licenses requiring it to “verify the age of all patrons entering the establishment by checking state or federally issued identification cards (no picture I.D., no entrance).”

8. Section 310.05(m) of the St. Paul Legislative Code contains a penalty matrix applicable to all license types, “except that in the case of a violation involving a liquor license § 409.26 shall apply where a specific violation is listed.” The penalty matrix in § 310.05(m) sets out presumptive penalties for violations of conditions placed on a license and violation of provisions of the legislative code relating to the licensed activity. These penalties are presumed to be appropriate for every case; however, the Council may deviate from the presumptive penalty in an individual case where the Council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the Council

³³ *Id.* § 409.08(2)(a).

³⁴ *Id.* § 409.08(21).

shall provide written reasons that specify why the penalty selected was more appropriate.³⁵

9. Pursuant to § 310.05(m) of the St. Paul Legislative Code, this would be the Licensee's third appearance within 18 months, for which the presumptive penalty is a \$2,000.00 fine and a 10-day license suspension.³⁶

10. Section 409.26 of the St. Paul Legislative Code, applicable to liquor licenses, contains a different penalty matrix that sets out presumptive penalties for specific offenses in connection with the sale of intoxicating liquor, including after hours display or consumption of alcohol and sale of alcoholic beverages to underage persons.³⁷ The purpose of this section is to establish a standard by which the City Council determines the length of license suspensions and the propriety of revocations, and it applies to all on-sale and off-sale licensed premises for intoxicating liquor and nonintoxicating liquor. The penalties in the matrix are presumed to be appropriate for every case; however, the Council may deviate therefrom in an individual case where the Council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the Council shall provide written reasons that specify why the penalty selected was more appropriate.³⁸ The occurrence of multiple violations shall be grounds for departure from such penalties in the council's discretion.³⁹

11. Pursuant to § 409.26(b) of the St. Paul Legislative Code, this would be the Licensee's third appearance within 18 months, for which the presumptive penalty is a license suspension of up to 18 days.⁴⁰

12. The City's recommendation to revoke all licenses would require a deviation from the penalty matrix contained in § 409.26. Except for a June 12, 2009, failure to check identification, Licensee's prior appearances before the Council have not involved the specific offenses that are the subject of this matter. The prior violations involved violations of other licensing conditions: lack of required security; failure to provide required security video; patrons in the bar after hours; failure to wand patrons; and serving liquor beyond the time set in a license condition.

13. There are not substantial and compelling reasons to impose the sanction of revocation in lieu of a fine and suspension of a license.

14. The ALJ adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

³⁵ *Id.*, § 310.05(m).

³⁶ *Id.*

³⁷ St. Paul Legislative Code § 409.26(b).

³⁸ *Id.* § 409.26(a).

³⁹ *Id.* § 409.26(c).

⁴⁰ *Id.*

15. The Memorandum that follows below explains the reasons for these Conclusions. To the extent that the Memorandum includes matters that are more appropriately described as Conclusions, the Administrative Law Judge incorporates those items into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge respectfully recommends that the St. Paul City Council take adverse action against the licenses held by Moonlight Magic, Inc.

Dated: June 11, 2010

s/M. Kevin Snell

M. KEVIN SNELL

Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and Moonlight has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. Moonlight and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to ascertain the procedure for presenting argument.

MEMORANDUM

There are two contested issues in this matter. First is whether or not Moonlight failed to comply with condition number four of its licenses on December 31, 2009. The Administrative Law Judge concluded that Moonlight did so fail. The second is the appropriate sanction for both the December 17 and 31, 2009, violations. Moonlight does not dispute its December 17, 2009, violation of law in serving alcohol to minors.

The contested testimony revolved around the specific issue of whether or not the Wilebski nephews who were performing the security functions on the mid-level landing on the evening of December 31, 2009, checked the identification of Sergeants Schoen and Sandell. Moonlight relied on the hearsay testimony of Mr. Wilebski. He testified that the nephews told him that they were first alerted by a patron that police officers were on their way up. This portion of the hearsay testimony is believable in light of the testimony by Sergeant Schoen. He acknowledged that, notwithstanding the fact that they were not in uniform, he and Sergeant Sandell could have been recognized by patrons because they have been St. Paul police officers for 22 and 25 years respectively. It is also consistent with the fact that Sergeant Schoen testified that Sergeant Sandell was recognized as a police officer by Mr. Wilebski's girlfriend. The ALJ accordingly found that patrons advised the nephews that police officers were on their way into the establishment.

Mr. Wilebski also testified that the nephews also told him that the officers displayed their badges at the landing and were allowed to pass on. This testimony is not credible for several reasons. First, Sergeant Schoen's testimony was unwavering that neither he nor Sergeant Sandell displayed their badges to the nephews at the landing. This testimony was not disputed by direct evidence. Second, the statements alleging the display of badges to the nephews is not supported by any direct evidence.

Third, common sense dictates that the statements regarding badge display at the landing cannot be given any weight. The purpose of the compliance checks is to determine whether or not **all** patrons entering are being checked for identification. It is simply not believable that a police officer would thwart the purpose of the exercise by displaying a badge before being asked for identification. The hearsay statements attributed to the nephews regarding the display of badges were not subject to cross examination and were given no weight by the Administrative Law Judge.

The Appropriate Sanction

The proposed license revocation raises important questions as to the overall proportionality of the sanction. Revocation of a St. Paul liquor license for cause is an adverse action that runs not only against the licensee but also against the underlying

real property.⁴¹ A revocation is a permanent bar to later use the real property and buildings for on site liquor sales. Such an action is of the utmost significance.⁴²

DIS argues that revocation is the appropriate sanction because of the number of violations within a single six month period. However, the evidence suggests that the two prior suspensions served their remedial purpose in eliminating Moonlights prior problems with complying with four of the fourteen license conditions: having the required number of security personnel at the appropriate times; availability of reliable security videos; patrons leaving the premises by the required time; and service of alcohol after last call. The one repeat violation was for condition number four, requiring the identification of all patrons prior to entry.

In the view of the Administrative Law Judge, applying a set of other sanctions and regulatory controls,⁴³ short of revocation, would yield a better and more just result.

Conclusion

Because the City did show by a preponderance of the evidence that Moonlight served alcohol to minors on December 17, 2010, and failed to check the identification of Sergeants Schoen and Sandell the evening of December 31, 2009, the Administrative Law Judge recommends that the City affirm these violations and impose an appropriate fine and a reasonable suspension of licenses.

M. K. S.

⁴¹ See, Saint Paul Legislative Code § 409.03 (a)(1)(a).

⁴² See generally *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 728 (Minn. App. 2003); *In re Ins. Licenses of Kane*, 473 N.W.2d 869, 874 (Minn. App. 1991).

⁴³ See generally Saint Paul Legislative Code § 409.10. It would be reasonable to expand Moonlight's condition number 12 to include periodic documentation of training of all employees and contractors with regard to all license conditions.